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In the Supreme Court of the United States

OCTOBER TERM, 1991

GENERAL MOTORS CORPORATION, PETITIONER

v.

EVERT ROMEIN, ET AL., RESPONDENTS

FORD MOTOR COMPANY, PETITIONER

v.

ARTURO GONZALEZ, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. MICHIGAN'S RETROACTIVE INCREASE IN WORKERS' COMPENSATION BENEFITS VIOLATES THE CONTRACT CLAUSE

A. Workers' Compensation Benefits Are An Implied Term Of The Employment Contract

The nub of respondents' legal argument is that workers' compensation benefits are not part of the "contract" between petitioners and their employees and therefore are outside the scope of the Contract Clause. This is so, according to respondents, because workers' compensation obligations are not "voluntarily agreed to" and are not "'bargained-for' expectations" (Romein Br. 19). Respondents' position is inconsistent both with this Court's precedents and with the essential contractual predicate for workers' compensation.

The relationship between petitioners and their employees is indisputably contractual in nature. Some of the terms of the contract are negotiated, while others (such as workers' compensation) are imposed by law. In effect, the State of Michigan has said to employers: "If you wish to enter into a contract of employment, it must include at least the following provisions for compensation in case of injury."

Thus, the contracting parties voluntarily accept workers' compensation as part of their agreement, much like the minimum wage. If employers entered into a contract to pay employees the minimum wage, and the state thereafter retroactively increased (or decreased) the minimum wage rate for services already performed and paid for, the legislative action unquestionably would implicate the protections of the Contract Clause. This case is no different.[1] Contrary to respondents' assertion, the fact that the workers' compensation term of the contract is

[1] Although we drew this analogy in our opening brief (see Pet. Br. 15-16), respondents have offered no response.

imposed by law does not make it any less a part of the contract or remove it from the domain of the Contract Clause.

1. As respondents recognize (Romein Br. 18), the term "contract" is to be accorded its "meaning * * * in common use." *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 197 (1819) (Marshall, C.J.). Although respondents concede that the Contract Clause extends to implied terms in contracts, they are at great pains to attempt to draw a constitutional distinction between implied-in-fact and implied-in-law contracts. This distinction is utterly devoid of support in the language or history of the Contract Clause. On the contrary, Blackstone, who served as the principal legal authority for the Framers, included both implied-in-fact and implied-in-law contracts in the category of implied contracts. See III W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 153, 158, 161 (1768).

This Court's decisions also reject respondents' assertion that contract terms required by law are not within the Contract Clause because they do not constitute "rights and duties * * * created through a knowing and voluntary exchange of promises" (Romein Br. 14). In *Coombes v. Getz*, 285 U.S. 434, 442 (1932), for example, the Court held that the plaintiff stated a Contract Clause claim based on a contract term incorporated from a statutory provision by operation of law. The Court squarely rejected the dissent's position, echoed by respondents here, that the defendant's liability was "purely statutory" (*id.* at 449) and therefore did not come within the Contract Clause, which "is aimed at true agreements, and not at quasi-contracts as distinguished from agreements implied in fact." *Id.* at 450.

Similarly, in *Steamship Co.* v. *Joliffe*, the Court held that a state statute gave rise to a "*quasi* contract" or "implied contract" (69 U.S. (2 Wall.) at 456-457) "which stands independent of the statute." *Id.* at 458. Despite the dissent's objection that there was "no ele-

ment of contract" and "no consent of minds" (*id.* at 468), the Court emphasized that "[i]n that large class of transactions designated in the law as implied contracts, the assent or convention which is an essential ingredient of an actual contract is often wanting." *Id.* at 457.[2]

Respondents' position also cannot be reconciled with the settled principle that the surrounding rules of law "'enter into and form a part of [the contract], as if they were expressly referred to or incorporated in its terms.'" *United States Trust Co.*, 431 U.S. at 19-20 n.17. Respondents give this principle an unreasonably narrow interpretation, contending that it applies "*only*" (Romein Br. 27) to those laws that bear on the validity and enforcement of the contract. They provide no basis to justify this artificial distinction, however, and it is refuted by the numerous cases cited in our opening brief (at 11-13 & n.4, 28 n.10) holding that the Contract Clause was violated by a statute modifying the substantive law that was implicitly incorporated in a contract.[3]

Finally, respondents misread the Court's analysis of implied statutory terms of employment contracts. See Pet. Br. 12-13. Nothing in those decisions even hints at respondents' purported dichotomy between implied-in-fact and implied-in-law contracts. Rather, they recognize without qualification that "a legislative enactment may

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[2] Respondents are incorrect in asserting (Romein Br. 24) that *Joliffe* has no bearing on the Contract Clause. See 69 U.S. (2 Wall.) at 467-468 (Miller, J., dissenting). See also *Coombes*, 285 U.S. at 444; *Shriver* v. *Woodbine Savings Bank*, 285 U.S. 467, 477 (1932); *Steamship Co.* v. *Portwardens*, 73 U.S. (6 Wall.) 31, 34 & n.* (1868).

[3] See, *e.g.*, *Wood* v. *Lovett*, 313 U.S. 362 (1941) (repeal of statutory guarantee of title, as applied to prior purchases, violated Contract Clause); *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95 (1938) (repeal of Teachers' Tenure Law, as applied to existing contracts, violated Contract Clause); *Treigle* v. *Acme Homestead Ass'n*, 297 U.S. 189 (1936) (repeal of statutory right of stockholder to withdraw his investment in building and loan association, as applied to outstanding withdrawal application, violated Contract Clause).

contain provisions which, when accepted as the basis of action by individuals, become contracts" (*Anderson*, 303 U.S. at 100) and that the Contract Clause "extends to such [implied] contracts just as it does to those specifically expressed." *Robertson*, 276 U.S. at 179.

Indeed, if, as respondents acknowledge (Romein Br. 26), a contract of public employment may include an implied term based on a statute, there is no reason why a private employment contract may not contain the same implied term. This flaw in respondents' argument is well illustrated by the Michigan workers' compensation statute, which provides that "[e]very employer, *public and private*, * * * shall be subject to the provisions of this act and shall be bound thereby." MCL 418.111 (emphasis added). Respondents' approach would lead to the untenable result that public employees would have an implied contractual right to workers' compensation, while private employees would not.

2. Respondents' argument also founders on the fact that an employment contract existed between petitioners and respondents as an essential precondition for application of the workers' compensation system. As the State of Michigan concedes (Br. 20, 36), "[c]overage under a workers' compensation system is conditioned on the employment relationship which is contractual in nature * * *. The contract of employment is a necessary prerequisite since it establishes the existence of the [employment] relationship." Thus, "a workmen's compensation act combines elements of both tort and contract." *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212, 215-216 n.7 (1969).[4]

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[4] *Cudahy Co.* v. *Parramore*, 263 U.S. 418, 423 (1923), is irrelevant here. In upholding a workers' compensation order against a due process challenge, the Court in *Cudahy* emphasized the employee's "status" in order to establish "the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured." *Ibid.* Nothing in *Cudahy* forecloses the conclusion that workers' compensation is an implied term of the employment contract.

As our opening brief discussed (at 15), employment contracts incorporate the workers' compensation scheme in several ways. First, workers' compensation benefits are one element of the employees' total compensation and thus affect other contractual terms such as wages and insurance. Second, the parties often bargain for enhanced disability benefits beyond the minimum required by law. Finally, workers' compensation benefits are central to the modern employment relationship; there can be little doubt that both employers and employees assume that coverage in case of work-related injuries is part—indeed, an important part—of the employment agreement. Accordingly, whether or not the employment contract explicitly refers to the workers' compensation system, those benefits are accepted by both sides as an essential ingredient of the entire contract. See *Great Northern Ry.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, 362 (1932) (parties "would be presumed to bargain with each other on the basis of existing law" (citing *Coombes*)).

Because workers' compensation benefits are inherently predicated on and necessarily subsumed in the parties' employment contract, they fundamentally differ from the "changes in the tax laws or the environmental laws" (Romein Br. 16) that respondents cite as instances of statutes that do not give rise to implied contractual terms under the Contract Clause. In contrast to workers' compensation statutes (see Pet. Br. 14), tax and environmental statutes are not embodied in the employment (or any other) contract; indeed, they do not even regulate the rights of the parties *inter se* but instead prescribe the relationship between private entities and the government or the public at large. For this reason, companies would be subject to the same tax and environmental obligations whether or not they have entered into contracts; that is not true for workers' compensation, which inextricably depends upon the existence of an employment contract and is central to the bargain.

Finally, the State cannot avoid the contractual element of workers' compensation benefits by arguing (Mich. Br.

15-19) for deference to the Michigan Supreme Court's ruling. Any deference in Contract Clause cases is limited to "question[s] * * * primarily of state law" (*Anderson*, 303 U.S. at 100) such as "the construction of the [state] statute" (*Phelps* v. *Board of Educ.*, 300 U.S. 319, 322 (1937)) or "the effect and meaning of the contract." *Hale* v. *Iowa State Bd.*, 302 U.S. 95, 101 (1937). There is no such dispute in this case; the sole question is one of federal constitutional law. Thus, the Michigan court's one-line statement that "benefits and liabilities in the workers' compensation statute do not create rights protected by the Contract Clause" (Pet. App. 14a) warrants no more deference than would a statement that a statute is "not a Bill of Attainder" or is "not an *ex post facto* law."

B. The Impairment In This Case Violated The Contract Clause

1. *Petitioners' contractual obligations were not fixed on the date of respondents' injuries*

Respondents begin their defense of the 1987 amendment with a state law argument—not adopted by the Michigan Supreme Court—that "petit[i]oners' contractual obligations were fixed *on the dates of respondents' injuries* and were subject to the laws in effect *on those dates.*" Romein Br. 30 (emphasis in original). Because respondents were injured prior to the 1981 coordination-of-benefits statute, they argue that that statute could not lawfully have reduced their workers' compensation benefits and therefore that the 1987 amendment was valid because it restored the pre-1981 benefit levels.

Respondents are simply wrong in suggesting that future benefit levels in Michigan are frozen forever at the level in effect at the moment of injury. The settled understanding of workers' compensation in Michigan is that benefits are subject to prospective modification by the legislature. This view of state law is confirmed by the decision of the Michigan Supreme Court in *Chambers* and *Franks*, which held that the 1981 statute coordinating benefits could be applied *prospectively* to reduce benefits for future disability periods but could not be applied *retroactively* to lower benefits for past periods. See Pet. Br. 4. This decision plainly contradicts respondents' assertion that employees' benefit levels are fixed on the date of injury and can never be thereafter reduced.

The weakness of respondents' position is further demonstrated by their need to invent an "exception" (Romein Br. 2) to their purported "general" rule in order to allow *increases* in future benefits. This "exception" is nothing more than respondents' *ipse dixit*. In terms of the agreement between the parties and the power of the legislature, there is no difference between prospective increases in benefit levels and prospective decreases; both are permissible under the theory of workers' compensation.

In sum, the contracts between petitioners and respondents contained a promise that, in the event respondents suffered a work-related injury, petitioners would make payments in an amount prescribed by the state workers' compensation law in effect for each subsequent period of disability. As reaffirmed in *Chambers* and *Franks*, the agreements thus contemplated that there might be a legislative modification—either upward or downward—in benefit levels for *future* (but not *past*) disability periods.

2. *The 1987 amendment cannot satisfy the prevailing Contract Clause standard*

Once it is recognized that the Contract Clause applies to purely retroactive modifications of workers' compensation obligations, it becomes obvious that the 1987 amendment cannot survive constitutional scrutiny. The only sort of Contract Clause analysis that the statute could possibly withstand is the one respondents put forward—a version that is so watered down as to read the Clause out of the Constitution.

a. *The substantiality of the impairment.* Neither respondents nor the State defend the Michigan Supreme Court's holding that the impairment here was insubstantial because petitioners retained the "basic benefit" of

tort immunity under the workers' compensation system. Instead, respondents assert that the impairment was not substantial because "employers in Michigan have for decades conducted their business affairs with an understanding that the * * * Legislature has from time to time altered benefit levels 'retroactively'" (Romein Br. 37). This argument is pure fiction.

To begin with, the Michigan Workers' Compensation Act expressly provides that "no compensation shall be ordered for any period which is more than 1 year prior to the date of filing [of an application for additional compensation]"[5] (MCL 418.833(1)), thus giving employers an explicit assurance that past benefit periods will remain closed.[6] Moreover, this reading of the statute is confirmed by uniform past practice. This is the first time in the 75-year history of workers' compensation in Michigan (or in any other state) that the legislature has ever reopened *closed claims periods* to alter benefit levels. Indeed, the Michigan Supreme Court unanimously held in *Franks* that a modification in obligations for past disability periods would be impermissible. 375 N.W.2d at 730.[6]

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[5] The Michigan Supreme Court has explained that MCL 418.833 is designed to "*limit* an employer's unexpected liability for compensation." *Howard* v. *General Motors Corp.*, 399 N.W.2d 10, 23 (1986). Respondents' only answer to this provision is their citation (Romein Br. 37 n.30) to a 1961 administrative ruling of dubious vitality (no Michigan court has ever cited it) that, on its own terms, allows compensation beyond the one year only when the higher amount "should have been paid from the beginning" (*Mowrey* v. *Motor Wheel Corp.*, 1961 WCABO 463)—such as, for example, when the employee's injury was greater than originally believed. That, of course, is dramatically different than an increase in benefit payments that conformed to the law in effect when they were made.

[6] Respondents cite a number of Michigan decisions as well as GM's brief in *Chambers* to support their claim that the legislature has previously interfered "retroactively" with the terms of workers' compensation benefits. See Romein Br. 2 n.1, 37-38; 1a-6a. But none of these rulings involved retroactivity in the sense that is relevant here. Rather, they all involved legislative changes in payments due for *future* disability periods—in other words, *prospective* changes in benefits—to employees who were injured prior to the legislative action. Thus, contrary to respondents' representations (Romein Br. 6, 10), GM's position in *Chambers* is fully consistent with its position in this case. Indeed, it is because petitioners understood and adhered to this fundamental distinction that they did not challenge the 1987 statute to the extent it eliminated coordination of benefits *in the future* for employees injured prior to 1982.

Respondents are wrong as well in arguing that the "particular circumstances" of this case precluded any reasonable expectation of finality. According to respondents, "at no point during the period from 1981 to 1987 did petitioners have a *reasonable basis* for the expectation that the Michigan Legislature * * * had conclusively decided to permit coordination of benefits for workers injured prior to 1982." Romein Br. 39. But what was the Michigan Supreme Court's unanimous decision in *Chambers* if not a conclusive determination that the 1981 statute plainly permitted coordination for employees injured before 1982? Petitioners' reasonable expectations, shaped on clear statutory language and an unambiguous decision from the State's highest court, surely were not negated by nonbinding legislative resolutions, letters from the ex-governor, or the fact that the legislature was debating a proposal to amend the statute to foreclose coordination in the future.[7]

b. *The significance of the public purpose.* A statute that works a substantial impairment of contract is unconstitutional if it does not serve a "significant and legitimate public purpose." *Energy Reserves*, 459 U.S. at

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[7] Respondents refer (Romein Br. 9) to House Bill No. 5084, as amended on January 29, 1986, in an effort to demonstrate that employers who chose to coordinate were on notice that retroactive liability might be imposed. Respondents fail to point out, however, that once the retroactivity provision was adopted as an amendment, the House *rejected* the amended bill. See 1986 House Journal No. 10, p. 138. The unamended version (without the retroactivity provision) was identical to Senate Bill No. 625, introduced on January 16, 1986. Far from alerting employers that retroactivity was on the way, this series of events served to confirm employers' expectation that the legislature would not take the unprecedented (and constitutionally dubious) step of imposing retroactive liability.

411. Respondents argue that this requirement is satisfied if there is some rational basis and public purpose for the Michigan legislature's decision retroactively to preclude coordination. See Romein Br. 40-41. The State goes even further, urging that the choice to disallow coordination need only be "a legitimate policy choice by the Michigan Legislature." Mich. Br. 54. But the Contract Clause demands far more than rationality and legitimacy of policy choices to sustain a substantial impairment of contract. See *Allied Steel*, 438 U.S. at 242 (state's justification must go beyond showing that the enactment is a valid "exercise of its otherwise legitimate police power").

Neither respondents nor the State has bothered to explain why the legislature's desire to allow employees injured prior to 1982 to receive non-coordinated benefits for *past* disability periods is constitutionally justified. By definition, the entire class of employees affected by the coordination provision continued to receive *full* compensation, through employer-funded pensions, social security, and other benefit programs, for their decreased ability to work. As the Senate analysis of the 1981 statute stated:

> [M]any employees now receive wage-loss benefits from two, three, or four different programs providing a total wage "replacement" greater than the wages the employee earned while on the job * * *. Coordination of benefits * * * would reduce the overlap between the various public and private wage replacement programs *while ensuring adequate wage-loss benefits to injured employees.*

Chambers, 375 N.W.2d at 723-724 (quoting legislative history) (emphasis added). *Nothing* in the debates preceding the 1987 amendment suggests that the class of employees injured prior to 1982 suddenly had become a group in dire need of economic assistance or, in CSG's revisionist view (Br. 23), were about to "fall[] into poverty." Indeed, it is worth reiterating that coordination of workers' compensation benefits to prevent double-dipping is the rule in many other states (see Pet. Br. 3-4 n.2) and governs *all* recipients of workers' compensation in Michigan injured after 1982.[8]

c. *The reasonableness of the means.* Respondents say virtually nothing to rebut our argument (Pet. Br. 25-27) about the poorness of the fit between the 1987 amendment and the purpose the Michigan Supreme Court attributed to the statute. Instead, they rely (Romein Br. 41; Mich. Br. 56) largely on the need to defer to the Michigan legislature's weighing of the equities. But deference is particularly inappropriate in the absence of some evidence that the legislature actually understood that it was impairing contractual obligations and nonetheless decided that the statute was a necessary, reasonably drawn measure. There is, of course, no such evidence here.

3. *The Contract Clause should be returned to its original understanding*

Respondents criticize our argument for a return to the original meaning of the Contract Clause on the ground that the historical evidence is "sparse and largely unilluminating" (Romein Br. 44). It is true that some issues have arisen in Contract Clause cases to which neither the text nor the history clearly speaks (*id.* at 47). On the issue of a purely retroactive law, however, the history is directly on point. See Pet. Br. 31-32, 35-36 n.14. Respondents' assertion that the distinction "between retroactive and prospective laws" is one that "cannot be deduced from either the literal language of the

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[8] Respondents appeal for sympathy by emphasizing (Romein Br. 4) that coordination reduced workers' compensation benefits for the two individual employees to zero. To begin with, this assertion is not accurate. In addition to full pension benefits, respondent Romein continued to receive an additional weekly workers' compensation supplement. J.A. 7. But more important, the reduction in respondents' workers' compensation payments shows only that *other* employer-funded benefits payments, such as pensions or social security, were large enough to compensate them fully for lost wages. A worker who was injured prior to retirement is not entitled to a higher wage replacement than an employee who worked until retirement.

Clause or the sparse evidence of the Framers' 'original understanding'" (Romein Br. 47) suggests a complete unfamiliarity with the debates at the Constitutional Convention.

The issue of retroactivity was the turning point in the debate over the Contract Clause. When first proposed by Rufus King, the Clause generated serious opposition from influential delegates including Gouverneur Morris, George Mason, and Luther Martin, all of whom thought that the proposal "would be going too far" and that certain legislative interferences with contracts might prove to be "proper, & essential." 2 THE RECORDS OF THE FEDERAL CONVENTION, at 439 (Morris), 440 (Mason); 3 *id.* at 214-215 (Martin). Even Madison, a supporter, admitted that "inconveniences might arise from such a prohibition." 2 *id.* at 440. Defenders of the proposal did not respond that the Clause would be subject to exceptions, limitations, or balancing. Rather, James Wilson stated that "[t]he answer to these objections is that *retrospective* interferences only are to be prohibited." *Ibid.* (emphasis in original). Several changes in language were then made, with the explanation that the provision was "requisite" to "restrain the States from retrospective laws in civil cases." *Id.* at 449 (Dickinson). Once these changes were made, the delegates who had opposed the initial proposal made no further objection and the Clause was adopted. *Id.* at 619.

Thus, the virtually absolute nature of the provision, which elicited opposition, was cured not by softening the legal standard but by confining the domain of the Contract Clause to retroactive laws—laws attaching new and unforeseen legal consequences to already completed contractual arrangements. Because this case involves a purely retroactive law (see Pet. Br. 36), it is a paradigmatic violation of the Clause.

Respondents' plea for *stare decisis* (see Romein Br. 42-44) in an attempt to avoid our historical analysis is equally unavailing. The doctrine of *stare decisis* applies to the holdings of courts, not to their dicta. Our approach is consistent with the holding of *Blaisdell* (contrary to respondents' repeated misrepresentations, see Romein Br. 45, 49, 50) and would provide a better framework for reconciling the inconsistent decisions before and since.[9]

II. MICHIGAN'S RETROACTIVE INCREASE IN WORKERS' COMPENSATION BENEFITS VIOLATES THE DUE PROCESS CLAUSE

A. There is a fatal tension in the due process arguments presented by respondents and their *amici*. Their position rests entirely on the claim that any form of retroactive legislation will be upheld if it rationally advances a legitimate state goal. See Romein Br. 13, 21; Mich. Br. 57-63; U.S. Br. 9-12; CSG Br. 7. At the same time, however, the United States and CSG acknowledge that reliance and other equitable considerations are important factors in the due process analysis. See U.S. Br. 11-12; CSG Br. 23-30. As our opening brief explained (at 43), a test that looks to reliance necessarily takes into account more than just the rationality of the statute.

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[9] Respondents assert (Romein Br. 48) that incorporation was a "privilege" under eighteenth-century law and that "corporate earnings" would therefore not have been protected under the original understanding of the Contract Clause. Respondents provide no evidence for this fanciful theory. It is true that the right to *incorporate* was classified as a privilege, but once an entity was incorporated, its property and its contracts were protected to the same extent as those of natural persons. See *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 691 (1819).

Respondents also contend (Romein Br. 48-50) that a change in this Court's understanding of the police power accounts for the post-*Blaisdell* change in doctrine. This confuses two lines of Contract Clause cases. Many Contract Clause cases—including those cited by respondents (at 49)—involved contracts in which the state agreed to give up some aspect of its taxing or regulatory authority. This Court gradually came to hold that the police powers of the state are not "alienable" and thus cannot be bargained away. See *Chicago & Alton R.R.* v. *Tranbarger*, 238 U.S. 67, 76-77 (1915). This does not have any bearing on the prohibition against retroactive alterations in contracts between private parties, which was the central concern of the Framers.

Contrary to respondents' assertion, this Court repeatedly has struck down retroactive statutes that unquestionably were rational in respondents' sense of the term. See Pet. Br. 39, 43; *Ettor* v. *City of Tacoma*, 228 U.S. 148, 149-150, 156 (1913). Respondents and the United States do not even attempt to explain away any of these decisions. For its part, CSG tries to dismiss these holdings as "vestiges of a pre-Realist era." Br. 15. But the decisions plainly did not lose their vitality with the demise of *Lochner*; two were unanimous, and most were written, joined, or supported by Justices Holmes, Brandeis, Stone, or Cardozo—none of whom had an unduly expansive view of substantive due process.

If, as respondents contend, bare rationality were enough to support the constitutionality of purely retroactive legislation, state or local governments could, for example, force travelers to pay tolls for having traversed routes that had been toll-free at the time of the journeys; or they could raise tax rates governing long-settled periods; or they could retroactively *reduce* workers' compensation and force employees to pay refunds to their employers. These examples are not fanciful. The first two describe governmental actions that were invalidated under the Due Process Clause by this or other courts;[10] the third, of course, is identical in principle to this case. The problem posed here accordingly is not *whether* there are due process limits on retroactive legislation beyond a requirement of bare rationality; it is identifying the *nature* of those limits.

B. This Court's decisions have preserved legislative flexibility (the principal concern of the United States and CSG) by allowing governments to attach *prospective* consequences to past acts (see Pet. Br. 42)—although even in those circumstances the Court's assessment of constitutionality has "take[n] into account" reliance on

[10] See *Forbes*, 258 U.S. at 339-340 (invalidating retroactive toll); *Washington Nat'l Arena Limited Partnership* v. *Treasurer*, 410 A.2d 1060, 1064 & n.3 (Md. 1980) (invalidating retroactive tax increase reaching back eight years).

prior law, as the United States acknowledges. See U.S. Br. 11, quoting *Turner Elkhorn*, 428 U.S. at 17. The Court also has permitted limited periods of retroactivity to prevent evasion of pending legislation. The cases upon which the United States and Michigan principally rely —*Turner Elkhorn* and *R.A. Gray*—fall into these categories. See Pet. Br. 47 & n.18.

The Court has taken a different tack, however, when confronting purely retroactive legislation that reaches back beyond the term of the enacting legislature. In such cases, it has distinguished "between permissible curative legislation and unconstitutionally retroactive legislation." *Van Emmerik*, 454 U.S. at 1132 (White and Blackmun, JJ., dissenting from dismissal of appeal) (citing cases). See Pet. Br. 38-44. While the United States (Br. 22-23) and CSG (Br. 15-16) assert that this approach unduly limits legislative prerogatives, it is hard to believe that legislatures will often find it necessary to require that completed transactions be revisited as though different legal rules had applied in the past. In fact, the paucity of non-curative, purely retroactive statutes offered by respondents and their *amici* makes clear that the Court's approach does not interfere with the legitimate processes of government.[11]

[11] The handful of statutes cited by the United States (Br. 14-18) —none of which, in any event, was challenged before or upheld by this Court—supports our observation that legislatures need not disturb the status quo retroactively to achieve their legitimate ends; the government pointedly does not (and could not) suggest that these statutes were both noncurative and purely retroactive. The 1978 amendment to the Black Lung Benefits Act, which responded to the congressional finding that "many seemingly allowable claims" were being wrongfully denied (H.R. Rep. No. 151, 95th Cong., 2d Sess. 5 (1978)), was a curative law designed to ensure that persons actually received the benefits to which they *initially* had been entitled. See *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 378 (1940). The same characterization describes the second 1984 amendment to the LHWCA. The initial 1984 amendment also was curative, responding to a decision that "changed key components of what had widely been regarded as the proper rules" (H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 24 (1984)); in addition, because the

The United States (see Br. 20-22) and CSG (see Br. 14-16) also claim to find it difficult to identify "curative" (or, for that matter, "purely retroactive") laws. But these distinctions surely provide more guidance to courts and legislatures than does the vague notion of "harsh and oppressive" legislation invoked by the United States (Br. 11) or the laundry list of equitable factors offered by CSG (Br. 24-30). Beyond that, the concept of curative legislation is not our invention; as Justices White and Blackmun noted in *Van Emmerik* (454 U.S. at 1132-1133), it has been applied by this Court for most of this century—a line of decisions that the United States and CSG simply disregard. See, *e.g.*, *Paramino*, 309 U.S. at 378; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 296, 302 (1937) (Stone, J.); *Graham & Foster* v. *Goodcell*, 282 U.S. 409 (1931) (Hughes, C.J.); *Saranac Land & Timber Co.* v. *Comptroller*, 177 U.S. 318, 330 (1900). These decisions reflect the fact that curative laws are unlikely to upset settled expectations because they merely correct a technical and inadvertent defect in the law, thus maintaining the status quo as understood by both government officials and private parties.

C. The cases cited by the United States (Br. 21) do nothing to "cast grave doubt" on our statement that the Court has never upheld a purely retroactive, non-curative statute. In fact, it is not at all clear that the government itself believes its assertion; its carefully qualified argument states only that the statutes involved in its examples "arguably" might be characterized as purely retroactive (Br. 20, 21). For example, *Funkhouser* v. *J.B. Preston Co.*, 290 U.S. 163 (1933), involved a state law authorizing interest on unliquidated damages in contract actions; the law was enacted after the contract at issue was entered into, but before an action was brought or judgment rendered. *Id.* at 165. As the United States itself recognizes (Br. 20), the law governed the conditions attached to *future* judgments rendered in inchoate lawsuits; unlike the Michigan statute, it did not reopen closed periods of liability and thus was not purely retroactive.[12]

Similarly, the cases upholding the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-262, do not support respondents because the statute at issue was an example of legitimate curative legislation. The Act was a response to the decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which, in requiring overtime pay for time spent by employees en route to their work sites, "was wholly unexpected by the overwhelming majority of both the unions and the employees [and] suddenly opened the door to billions of dollars of back-pay claims against employers who had not included this time in computing the number of hours worked by their employees." Slawson, 48 CALIF. L. REV. at 228 (footnote omitted).

In precluding backpay claims premised on the theory announced in *Mt. Clemens*, the Act was expressly designed to preserve the status quo by permitting awards that were grounded on "a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed." 29 U.S.C. § 252(a)(2). What is more, the Act applied only to pending or future claims; pre-enactment payments (whether or not the result of a judgment) were unaffected. Thus, "viewed realistically, it was the Supreme Court's unexpected decision, rather than the statute, which was the primary source of retroactivity." Hochman, 73 HARV. L.

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statute applied only to cases pending on the date of enactment, it was not purely retroactive. And CERCLA, like the statute at issue in *Turner Elkhorn*, attaches *prospective* consequences to past acts.

[12] *League* v. *Texas*, 184 U.S. 156 (1902), upheld a statute providing for the retroactive assessment of interest on back taxes because "interest is the ordinary incident to the non-payment of obligations" (*id.* at 162)—a holding that says nothing about whether substantive obligations may be changed retroactively. And the Renegotiation Act, involved in *Lichter* v. *United States*, 334 U.S. 742, 788 (1948), by its terms permitted recovery of profits only under "future contracts and * * * contracts already existing but pursuant to which final payments had not been made prior to the date of enactment of the original Act." It therefore did not reopen finally settled transactions.

REV. at 721 n.155. Contrary to CSG's assertion (Br. 11), therefore, the Portal-to-Portal Act is distinguishable from the 1987 amendment. The former ratified the pre-existing practice and reinforced reasonable expectations; the latter undid five years' worth of transactions.[13]

D. Under this Court's decisions, the 1987 amendment violates due process. The statute is purely retroactive, making past acts wrongful even though they were lawful when performed. The United States and CSG do not contend otherwise; rather, their principal assertion—that the statute did not disturb reliance interests because it effectuated the legislature's original intent—rests largely on self-serving, extra-record expressions of "surprise" issued after the Michigan Supreme Court rendered its decision in *Chambers*. See CSG Br. 2; Romein Br. 7-8. Those expressions are belied by *Chambers* itself, where a unanimous court found that coordination was required by the 1981 law's "clear[] and unambiguous[]" language as well as by its plain legislative history. 375 N.W.2d at 721, 725 & nn. 14, 18. In fact, the majority below did not take issue with Chief Justice Riley's conclusion, based on an extensive canvass of the legislative background (see Pet. App. 31a-37a), that the 1987 amendment was a conscious and dramatic *departure* from the intent underlying the 1981 statute.[14]

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[13] *United States* v. *Sperry Corp.*, 110 S. Ct. 387, 392 (1989), is equally inapposite, because the statute at issue ratified administrative practice and thus was a classic curative act. The other decisions cited by CSG (Br. 12) were expressly grounded on the distinction between curative and other types of retroactive laws. See *Paramino*, 309 U.S. at 378-379; *Swayne & Hoyt*, 300 U.S. at 302; *Graham & Foster*, 282 U.S. at 429.

[14] Without supporting citation, CSG makes the startling assertion (Br. 17) that the Michigan legislature rather than the state judiciary has the ultimate responsibility to interpret legislation because "Michigan has * * * chosen to give its legislature the option of acting as a court of last resort on questions of statutory construction." In fact, in Michigan as elsewhere, "the proper construction of a statute is a judicial function" (*Webster* v. *Rotary Electric Steel Co.*, 33 N.W.2d 69, 70 (Mich. 1948)) and the legislature "may not by statute attempt to exercise judicial power by construing a statute for the court." *Bankers' Trust Co.* v. *Russell*, 249 N.W. 27, 30 (Mich. 1933).

The 1987 amendment therefore did not cure a technical and inadvertent oversight or omission. Instead, it reversed an important and hotly debated policy decision in the 1981 law. Indeed, the State frankly concedes in this Court that the 1987 statute "reflected the latest in a continuing series of policy choices made by the Michigan Legislature." Mich. Br. 5; see *id.* at 54.[15]

E. Even apart from the special scrutiny due purely retroactive laws, the 1987 amendment is unconstitutionally arbitrary. In arguing to the contrary, the United States declares it evident that the 1987 law was intended to undo the 1981 legislation and in fact "had the effect that the Michigan Supreme Court described." Br. 25. But this analysis is circular; it would premise constitutionality on " 'a mere tautological recognition of the fact that [the legislature] did what it intended to do.' " *Logan*, 455 U.S. at 441 (opinion of Blackmun, J.) (citation omitted). If that were the test, no statute would ever fail the rational basis test.

The United States also misunderstands our argument when it suggests (Br. 27) that we "merely quibble with the means the Michigan legislature used." Our point is that the *mismatch* between the legislature's "means" and ends is so great as to belie the claims that the 1987 amendment rationally advances the statutory goal hypothesized by the court below. If the legislature truly intended to ease the financial burden on employees injured prior to 1982, why would it have increased the benefits

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[15] It cannot be dispositive, as CSG contends (Br. 10, 14), that the Michigan legislature labeled the 1987 statute curative. " 'The presence of "curative" language, or a recital that the Legislature in the past really intended what is now being enacted into law, cannot render a statute immune from constitutional challenge on retroactivity grounds. If it did, any retroactive legislation could be shielded from a successful constitutional attack merely by the insertion of such language.' " *Vytar Associates* v. *City of Annapolis*, 483 A.2d 1263, 1271 (Md. 1984), quoting *Washington National*, 410 A.2d at 1069.

only to those employees with *other* sources of wage-replacement income? See Pet. Br. 49-50. Needless to say, it is equally doubtful that the 1987 law rationally serves the wholly imaginary purposes conjured up for it by CSG (Br. 22-23).

Finally, in accord with their general disregard for unfavorable authority, respondents, the United States, and CSG do not even bother to discuss *Alton*, where this Court invalidated as arbitrary a statute that closely resembles the 1987 amendment. Although the State for its part dismisses *Alton* by attempting to analogize the statute there at issue to the black lung benefit provisions upheld in *Turner Elkhorn* (Mich. Br. 62), its conclusory assertion simply ignores the critical distinctions between the two statutes. See Pet. Br. 48-49.

F. In sum, it is not our contentions that would have the Court "shift gears dramatically." U.S. Br. 19. To the contrary, it is respondents and their *amici* who wholly ignore a very substantial body of this Court's decisions. Because the 1987 amendment is " 'a bare attempt of the legislature retroactively to create liabilities for transactions . . . fully consummated in the past,' " it cannot be sustained. *Swayne & Hoyt*, 300 U.S. at 302 (citation omitted).

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the Supreme Court of Michigan should be reversed.

Respectfully submitted.

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